In the

Supreme Court of the United States

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, et al., Appellants,

v. No. 72-792

DOLORES DUBLINO, et al., Appellees;

and

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, et al., Appellants,

v. No. 72-802

DOLORES DUBLINO, et al., Appellees.

Washington, D. C.
April 17, 1973
April 18, 1973

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HOOVER REPORTING COMPANY, INC.
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546-6666

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ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, et al., Appellants, v. DOLORES DUBLINO, et al., Appellees.	No. 72-802

Washington, D. C.,

Tuesday, April 17, 1973.

The above-entitled matters came on for argument at 2:37 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. JEAN M. COON, Assistant Solicitor General of New York, The Capitol, Albany, New York 12224; for the Appellants.

DENNIS R. YEAGER, ESQ., 423 West 118th Street, New York, New York 10027; for the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Nos. 72-792 and 72-802.

Mrs. Coon, I think you may begin whenever you're ready.

ORAL ARGUMENT OF MRS. JEAN M. COON,

ON BEHALF OF THE APPELLANTS

MRS. COON: Thank you.

Mr. Chief Justice, and may it please the Court:

In directing argument on the merits in this case, the Court postponed the question of jurisdiction. That issue has been briefed by both appellants, and I wish to comment only briefly on jurisdiction.

The complaint in the instant case attacked New York's work referral statutes, claiming that they conflict not only with the provisions of the Federal Social Security Act, but also that they violated both the Thirteenth and Fourteenth Amendments of the Constitution of the United States.

Those latter issues were extensively briefed and argued by all parties.

The district court, in its decision, rejected the Thirteenth and Fourteenth Amendment claims, but did discuss them at length and did consider them substantial constitutional questions, even though it eventually found them not to be sustained on the law.

It is our understanding of the decisions of this Court that as long as the constitutional questions raised are substantial, a statutory three-judge court is properly convened and consequently an appeal directly to this Court is also proper, even though the district court ultimately rejects the claimed constitutional invalidity.

We might also observe that if this is not the case, then this Court should consider whether, as held by the Second Circuit in the Hagans case, cited in the appellants' briefs, there was a substantial Federal question at all present in the case sufficient to confer jurisdiction even upon a single district judge.

QUESTION: Well, I presume, Mrs. Coon, even if this Court were to determine that the constitutional question had been insubstantial under Bailey v. Patterson and the Phillips case, we would have authority to remand for a hearing before a single district judge on your appeal, would we not?

MRS. COON: Oh, yes, Your Honor, that's entirely true. But we are also suggesting to this Court the possibility that the Court may adopt the Hagans case rule in the Second Circuit, that if the question is found not to be substantial Federal constitutional question at all, that is a matter for the State courts and not for the Federal courts to determine.

Our main argument is, of course, addressed to the merits of the State statutes here at issue.

Briefly, the statutes at the time of the commencement of the action provided that all social services recipients in the Aid for Dependent Children, and then also the totally State-funded home relief categories, must, if employable, register with the State Employment Service of the State Department of Labor, report semimonthly to that office for job referral and to pick up welfare check, and to accept employment when offered, and further provide for public works project employment for persons not placed in private employment.

The work referral statutes also provide a definition of those who would be considered unemployable: the aged, the sick and disabled, children in school, vocational trainees, and mothers whose presence was needed in the home to care for children, or those mothers for whom day-care services were not available.

Subsequent to the commencement of this action, the referral statute was amended to provide that the original definition of employability would apply only to the home relief recipient, and that as to ADC recipients their employability would be determined under the Federal Work Incentive Program definitions. Except that the child care exemption was continued in the same language as that originally provided in the 1971 enactment.

Furthermore, the 1972 amendments specifically stated

that prior to the time that a work incentive program registrant is actually enrolled and participating in the Federal WIN program, that the work referral and check pickup provisions would continue to apply.

The statute here at issue was part of a general welfare reform program initiated by the Governor of the State of New York in a Message to the Legislature in March of 1971.

Briefly, the purpose of the legislation was stated to be: to see to it that we not only continue to meet the basic needs of those who cannot do for themselves, but that we also encourage the young and able-bodied temporarily in need of assistance to achieve the education and skills, the motivation and determination that will make it possible for them to become increasingly self-sufficient, independent citizens, who can contribute to and share in the responsibility for their families and our society.

With the advent of the State's work referral program adopted as a part of that reform package, the employable recipients of public assistance in HR and ADC categories were subject to job referral under either one of two programs: the Federal WIN program applicable only to the ADC recipients provides for job or training referral of certain categories of recipients in a limited geographical area, 12 out of the State's 58 welfare districts.

All employable HR recipients and employable ADC

recipients not participating in WIN are referrable to employment under the State statute and also under the statute to public works employment, although the public works feature as to the ADC recipients was never implemented because of HEW objections.

QUESTION: Well, in the districts where you have WIN, does the State program operate also?

MRS. COON: The State program operates also, but all the witnesses who testified in the depositions stated that a person who is eligible for the WIN program must first be referred to the WIN program and only if there is no position available for him there will he be referred under the State program.

QUESTION: Do they actually operate out of the same buildings, or something like that?

MRS. COON: Well, they do actually operate both out of the State Employment Service.

QUESTION: Both out of State Employment?

MRS. COON: Yes. And I think --

QUESTION: And the limited number of so-called slots in WIN is determined by budgetary considerations, where so many slots are --

MRS. COON: Well, yes, it's determined --

QUESTION: -- allocated to New York, is that the way it works?

MRS. COON: Right. So many slots are allocated to New York, and it's determined by both budgetary and by the contract determinations of the Secretary of Labor.

In other words, annually there are initial, new contracts entered into with the Secretary of Labor, which provide for the number of persons who will be serviced under the WIN program and also provide for the Federal funding.

QUESTION: So the budgetary considerations are Federal budgetary considerations?

MRS. COON: They are Federal budgetary considerations, yes.

QUESTION: And this is determined in advance each year?

MRS. COON: Well, it can be determined -- redetermined during the year.

QUESTION: Yes.

MRS. COON: Actually, in 1972, the 1972-73 Federal fiscal year, the contract was modified, I think, three times. Each time to increase the amount of money which would be available, and therefore the number of slots, the number of persons to be serviced.

QUESTION: And what were there? Some 18,000 slots?

MRS. COON: Yes. In the '71-72 fiscal year.

QUESTION: In '71-72.

QUESTION: Do the same personnel in these offices

operate or administer both programs?

MRS. COON: In some of the offices, yes. There are a few districts, I believe New York City and possibly, I think Erie County possibly, that have separate WIN offices, specifically WIN offices. But for the most part it's operated out of the same office.

QUESTION: Which program makes the greater number of referrals?

MRS. COON: Well, I think, in terms of the number of people who are serviced, I think the State program has handled more people. Once again it's a question of --

QUESTION: How about in the 12 districts where you have both?

MRS. COON: I think that it -- well, in the 12 districts we have most, once again, it's the State program that has generally handled more people, simply because of the unavailability of positions in the WIN program.

As we said, that if there were WIN positions open for these people, and they had a position to put them in --

QUESTION: But the WIN positions don't differ in kind, do they, from the State program's positions?

MRS. COON: They may, there may be training positions as well as work positions.

QUESTION: That is in the WIN program?

MRS. COON: In the WIN program, yes.

QUESTION: Yes.

MRS. COON: Under the WIN program there is a training feature and they may be referred to training. The training feature, under the recent amendments to the WIN program, the Federal Social Security Act, have been de-emphasized; it's been more a work program. Prior to that a WIN trainee could be in training for an average of one year.

QUESTION: What numbers are we talking about, say for the last six-month period?

MRS. COON: Well, I can't give it to you for the last six months. On the basis of the record in this case, we're talking about, in the first year there were -- at the same time that there were slightly over 17,000 persons in the WIN program, there were 29,000 other public assistance recipients who were given work experience under this program, either referred to jobs or in public works employment. And an average of 15,000 persons were -- 50,000 persons were reporting each month to the State Employment Service for Manpower Services for jobs and for job referrals.

So that there were, I'd say, an average of 50,000 persons each month, the same persons over and over again in many cases, but these people were being referred.

And I think that in terms of the 29,000 people who did have some work placement, that it is important to remember that during this time New York State was also in an economic

depression. New York was one of the last to have the increased unemployment and was also one of the last to get out of the increased unemployment in the past year.

QUESTION: Then I take it the same recipient might perhaps have been -- have worked under both programs?

MRS. COON: No, it's not likely. It's not likely, that a person in training or a referral under the WIN program would most likely still -- if they're in the WIN program participating, that even if they had a -- subsequently became unemployed, they would still be being serviced through the WIN program.

So that those people, the 29,000 that were placed under the State program were not WIN participants.

QUESTION: These are in addition to the WIN participants?

MRS. COON: Yes.

QUESTION: And that's in areas where the WIN program doesn't operate.

MRS. COON: No, it's in areas where both the WIN program operates and where it does not.

QUESTION: Well, aren't there some areas where the WIN program is not operating?

MRS. COON: Is there some area -- geographically, the bulk of the State the WIN program does not operate. In terms of numbers of recipients, most of them are in the WIN

area.

QUESTION: What happens to the recipients in those areas where the WIN program is not in operation?

MRS. COON: Under this statute they would be referred under the State statute. Under the present situation, on the decision which we're here appealing, the order of the district court, there is no work requirement for the ADC category in the present law.

QUESTION: Yes.

QUESTION: But on the work referral, apart from the training referrals you told us about under the WIN program, are the criteria any different?

MRS. COON: The criteria are somewhat different in terms of the method by which they're placed. For example, in the WIN program there is a requirement that they be given physical examinations before placement. We say this is not a significant question, because if there is a question raised as to physical capacity, the State Employment Service returns the State referees to the Department of Social Services for a determination of physical capacity.

So we say this is not a substantial -- it may be a question of the time or physician, in which the physical examination or physical consideration is taken care of.

Under the Federal regulations, HEW regulations, the local Social Services Department is required to provide child-

care services either for persons who are referred under the WIN program or for others for whom the State requires either work or training. So they come under the same child-care requirements that there are under the WIN program.

QUESTION: Is the age bracket the same, 16 to 64?

MRS. COON: Yes. There are some people in training in the WIN program who are in their sixties.

QUESTION: But under the Work Rules program of New York --

MRS. COON: Yes.

QUESTION: -- it's 16 to 64, as I understand it; there's a --

MRS. COON: Yes.

QUESTION: -- presumption of employability.

MRS. COON: Yes.

QUESTION: I wonder,when you have the same personnel administering both programs, how the decision is made whether they are referred under one or the other programs?

MRS. COON: Well, the initial referral to the WIN program is made by the local Social Services office. There they are determined to be referrable, they're appropriate for WIN referral and are then referred to the State Employment Service, for WIN registration and participation.

QUESTION: Mrs. Coon, did I understand you to say that the referral always must be made to the WIN program if a

program of that kind is available?

MRS. COON: Yes.

QUESTION: So it only comes under the State program if there's no WIN program available, or no slot within the program available?

MRS. COON: That's true. That's precisely true.

Principally we submit to the Court the State statutes and regulations here providing for work referral, and penalizing Social Services recipients for refusal to accept employment are not in conflict with the Federal Social Security Act.

One of the basic purposes of the Federal Act is to develop capabilities and self-support. The Federal Act has recognized from its initial inception the objective of that self-support.

The New York rules, we submit, do no more than implement the intent of the Federal Act by providing for the referral of employable public assistance recipients to employment. They add no new conditions of eligibility not already contemplated by the Federal Act.

The primary contention of the appellees has been simply that the Federal Social Security Act was intended to preempt the entire field of welfare regulation and work requirements. However, the Social Security Act --

QUESTION: Is there an additional sanction -- is

there an additional sanction provided by the New York law, over what the Federal law would --

MRS. COON: There is a thirty-day suspension of eligibility if they refuse to comply with the work referral provisions, under the State law.

QUESTION: How about Federal?

MRS. COON: Under the Federal law, it's only so long as -- they can be suspended only so long as they do not, are not willing to participate.

QUESTION: Well, which is the more severe?

MRS. COON: The appellees contend that it's the State, because it has the automatic provision of thirty days. In other words, if a person doesn't want to comply under the WIN program, and refuses to accept either training or employment, he then is entitled under the WIN program to a sixty-day counseling period, which he doesn't have to accept, and he can't be suspended during that sixty days.

QUESTION: But he can be under the State law?

MRS. COON: Yes. There's no counseling period.

QUESTION: Now, is that a -- you don't think that that's a conflict at all?

MRS. COON: I don't think that's a statutory conflict.

QUESTION: Well, it certainly is a refusal to pay benefits for a period of time, which, under the Federal law,

would be required, at least under the WIN program.

MRS. COON: Well, --

QUESTION: Isn't that right?

MRS. COON: Yes. But even under -- we're talking -- we submit to the Court here, what we're doing, we're talking about different people. That if they are eligible for participation in WIN, if there's a slot available for WIN, they're entitled to all the WIN procedures. The question of the application of the procedures, we think is more a question of the due process arguments under the Fourteenth Amendment, which the appellees raised in the district court and which they raised on another appeal to this Court, in which the jurisdictional statement is still pending.

QUESTION: So would you suggest that the State would be permitted to have a parallel work program, or work program parallel to WIN and for a person who couldn't get into a WIN slot, who refused to go along with the State referral program, that that person could permanently be deprived of all aid?

MRS. COON: Oh, no. I don't think so.

QUESTION: Why not?

MRS. COON: Because I think that there is --

QUESTION: That would be contrary to the Federal Act, wouldn't it?

MRS. COON: That would be contrary to the Federal Act.

QUESTION: Well, how can you do --

MRS. COON: But I think under this proposal --

QUESTION: -- this, deprive them for sixty days or thirty days?

MRS. COON: Because I think the Federal Act itself has, particularly with the unemployed parent provision, has particularly taken into consideration the fact that the States may provide -- that they set up this provision that you're --

QUESTION: You may be quite right, because your work referral program, as such, isn't inconsistent, but what about your sanction; is that permitted by the Federal Act?

MRS. COON: No, I don't think that --

QUESTION: Well, that's what I'm asking you about.

MRS. COON: I don't think it is prohibited. Because, for example, under the Federal unemployed parent program, it provides for a discontinuance of assistance, as I said, during the period in which a person refuses to comply, is no longer willing, and the Congress, in enacting this, took into consideration this fact, and said that it would be up to the States, that there was leeway left with the States to determine how long this period would be. But it could not be, it certainly could not be forever.

QUESTION: Mrs. Coon, what do you understand is the basis upon which the three-judge court held that the WIN program was exclusively used?

MRS. COON: The three-judge court said it was contrary to the legislative history of the Federal Act, without stating what legislative history they had in mind, and cited principally the decision in Woolfolk v. Brown in the Federal District Court in Virginia.

We submit that the Woolfolk case is distinguishable from this. In that in that particular case the recipients involved lived in a WIN district. They had not been specifically determined to be inappropriate for WIN referral. The district court in that case said that you could not refer under a State program persons who were inappropriate for referral to WIN.

However, in that case, reading the language of the decision of the district court in that case, they said that the determination as to who is appropriate for referral or inappropriate for referral based on remoteness must be based on individual cases.

Now, they also said that the -- which we interpret as saying that it must apply only in districts where there is a WIN program. In other words, that in State districts, welfare districts, where there is no WIN program, the Woolfolk case does not even apply on its face.

And secondly, that, to the extent that a State program parallels and refers to the WIN program, and takes into consideration those people who have been determined to be

inappropriate for referral to WIN, although they can be referred under the State program to State jobs, we submit that to that extent the district court in Woolfolk was incorrect in its interpretation of the statute, of the requirements of the statute in the supremacy situation.

Now, we point out to the Court that only in the Woolfolk case, and those cases which cited the district court in Woolfolk, all these cases arising before this Court affirmed Woolfolk, that those were the only cases in which the Court has ever held a State parallel work requirement to be invalid under the supremacy clause.

And there are some 20 or 21 States which have developed parallel State work requirements at the same time that the Federal system has been developing its work requirements under the Social Security Act.

All of these State programs have developed and paralleled along the same time that the Federal Government was getting into the act of work requirement.

So that --

QUESTION: Incidentally, I gather that the three-judge court also found the hearing provided was inadequate on due process grounds, didn't it?

MRS. COON: They found the hearing inadequate only as to the HR recipients on the basis that there was no specific notification to them of their right of a hearing at

the time of the determination of employability.

QUESTION: Yes. And this, however, was only -- the hearing requirements in connection with the WIN program, which they said was exclusive?

MRS. COON: No, they said that there should be a -- well, the State law requires a hearing, and the evidence in the case indicated that the, under the State law a hearing as to employability would be granted and would be granted prior to the time that -- that it could be granted without somebody saying "I won't comply" and taking the risk of losing their assistance.

But the district court found that there should be, for due process, there should be notification of the right of this hearing at the time of determination of employability and directed the State Department of Social Services to provide for such notification, which has been done.

QUESTION: As I understand, that's not in issue before us.

MRS. COON: No, that's not.

QUESTION: You said the State has complied with that, and has not appealed from it; is that right?

MRS. COON: Right.

QUESTION: No statute was struck down or any part of any statute was struck down in that adjudication.

MRS. COON: No. No. They simply found that the

additional hearing requirement, that there was an additional hearing requirement with which we should comply.

We submit that the tests on supremacy start with the question of whether or not Congress, in enacting the Federal law, has specifically stated that it is preempting a field that is intended to be -- that the Federal statute intends to preempt the field. There is no such specific provision in the statute.

The further tests say that in order to be determined to be invalid, the State statute must stand as an obstacle to the accomplishment of the Federal statutory purposes. Here we say that the two programs work parallel and complementary to each other; that the State statute regulation never stands as an obstacle to the accomplishment of the Federal objective which, in the end result, is employment.

But a State regulation must give way only where both the Federal and State regulations cannot be enforced without impairing Federal superintendence of the field.

Here we say, once again, the two statutes work together, that the two systems of referral of employment work together, and that the objective of self-sufficiency is aimed at similar objectives.

MR. CHIEF JUSTICE BURGER: You will have about seven minutes remaining in the morning, Mrs. Coon.

MRS. COON: Yes.

[Whereupon, at 3:00 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., on Wednesday, April 18, 1973.]

IN THE SUPREME COURT OF THE UNITED STATES

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, et al., Appellants, v. DOLORES DUBLINO, et al., Appellees.	No. 72-792
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ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, et al., Appellants, v. DOLORES DUBLINO, et al., Appellees.	No. 72-802

Washington, D. C.,

Wednesday, April 18, 1973.

The above-entitled matters were resumed for argument at 10:08 o'clock, a.m,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES: [Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll continue the arguments in No. 72-792.

Mr. Yeager, you may proceed whenever you're ready.

ORAL ARGUMENT OF DENNIS R. YEAGER, ESQ.,

ON BEHALF OF THE APPELLEES

MR. YEAGER: Mr. Chief Justice, and may it please the Court:

This case does not involve a question of the perfection of the Federal Work Incentive Program. In 1967, Congress enacted for the first time a compulsory work program for all AFDC recipients, which it required each of the States to include in its plan of Aid to Families with Dependent Children.

When it enacted that program, it described the program in the introductory statutory material as being designed to cultive in individuals the sense of dignity, self worth and confidence that flows from being a wage-earning member of society. In 1971 the State of New York elected to enact its own compulsory work program applicable also to AFDC recipients, which established a presumption of employability for such recipients and which was designed to and to a certain extent did achieve maximum welfare roll reductions.

On administrator in the State of New York

characterized the results under the program as follows:

"Last month, the weekend of October 5th, we closed 100 cases. I haven't really gotten the closing codes for all these cases; I would think that the employment section is having a greater impact on the rate of closing. We are closing a very great proportion of cases on the basis of failure to comply on the employment procedures.

"That seems to be reflective of a somewhat different purpose than the purpose which Congress had in mind when it enacted the statute designed to cultivate a sense of dignity, self worth and confidence."

Also worthy of note, that that quotation is not exceptional.

QUESTION: What's the closing cases?

MR. YEAGER: Closing cases? Your Honor, in a study that was done by the Department of Health, Education, and Welfare and the Department of Labor of the administration of this program in the State of New York, it was found that what they were -- I'm sorry, it wasn't in the study. Excuse me.

In the stipulation of facts in the case, it appears that approximately 11,000 jobs were found while approximately 13,000 case closings occurred as the result of failures to comply, not as the result --

QUESTION: Does that mean you terminate the cases, or what?

MR. YEAGER: Terminating benefits, deny all benefits.

QUESTION: Completely?

MR. YEAGER: Completely. That's correct, Your Honor. Except -- that is, as to the individual who was refusing to take part. If there is some other individual in the family who is still eligible for AFDC, they would continue to receive their share of the benefits.

QUESTION: Well, wasn't it a particular part of this program, the requirement that welfare recipients come personally and collect their checks?

MR. YEAGER: That's correct, Your Honor.

QUESTION: And didn't those, at least some of those closings, weren't at least some of those closings attributable to the failure of people to come personally and pick up their checks rather than to the work program?

MR. YEAGER: That would be correct. Some of those, some of those would be attributable to failure to come and pick up your check.

And that would mean that there was a very substantial hardship, amounting almost to impossibility for some people to go after those checks.

QUESTION: But it wouldn't, necessarily, in all cases, I mean it wouldn't -- I mean, there was a purpose, wasn't there, behind requiring people to come and pick up

their checks personally?

MR. YEAGER: The purpose was --

QUESTION: What was the purpose for --

MR. YEAGER: -- characterized by HEW as possible harassment in a letter, Exhibit 16 in the case. The purpose, also, I think, was rather unspecifically applied, because the study to which I inadvertently referred a moment ago, the HEW-DOL study, found that some 67 percent of the people who claimed that they were not employable, i.e., should not be required to report, --

QUESTION: Right.

MR. YEAGER: -- were incorrectly characterized as people who should report.

QUESTION: What was the purpose behind the -- what was the avowed or purported purpose behind the inauguration of the requirement to come personally and pick up the check?

MR. YEAGER: Your Honor, I'm not sure if that was ever explicitly stated by the Governor when he introduced the legislation in the State; I take it that it was part of the purpose, over-all purpose, of securing a checkup on whether or not individuals were employable.

The statute required that the individual obtain a certificate from the State Employment Service semi=monthly, that there was no job available for that person. That was one of the purposes, certainly, to discharge the requirements --

that particular requirement of the statute.

QUESTION: Was there another purpose, too? Wasn't it a means, one means of checking to see that a person was still in the State of New York and hadn't moved to Florida, who was collecting comparable benefits down in Florida while getting them through the mail in New York?

MR. YEAGER: Your Honor, it would be a means of doing that, but I think the purpose of the statute as stated by New York when it was enacted was to provide for employability of welfare recipients. Now, --

QUESTION: Well, it's for eligibility generally, too, is it not?

MR. YEAGER: I don't think the purpose was stated to be that by the Governor when he introduced it.

QUESTION: It would have that effect --

MR. YEAGER: I mean, it would have that effect; I mean, it would have that effect.

QUESTION: Well, there are cases, I am sure, if you've been in this field, where people receiving their benefit checks through the mail had moved to another State, established a residence, and received checks from both States.

MR. YEAGER: I am sure that is occasionally a problem, Your Honor.

QUESTION: And this would be one way to check on that, wouldn't it?

MR. YEAGER: Yes. I think HEW does suggest in its manual that the most appropriate method for delivering checks to individuals is through the mail. I think that the requirement, as it was enacted in the State of New York, was really one related to those employability requirements.

Interestingly, you know, the State of New York did have a residence requirement which they enacted at the same time, which was held to be unconstitutional, and that particular requirement presumably would have been the place in which the State would have enacted a requirement that was specifically addressed to the problem of dual residency.

That was enacted the same time as the work program.

Four district courts and one Circuit Court of Appeals have reached the conclusion that the Compulsory Work Program established by Congress has precluded the States from enacting similar compulsory work programs. Those decisions were right on three separate grounds in this particular case.

First of all, they were right because the Federal Government has preempted the State activity in this area; secondly, the decision were right because the work rules constituted additional conditions of ineligibility; thirdly, they were right as applied to this particular case because the New York statute is in conflict with the Federal statute at so many points.

In 1935, Congress enacted a Social Security Act.

The President's Message, which conveyed that Act to the Congress, included within it a suggestion of a program for aid to widowed and otherwise separated mothers. That program, according to the message, was, quote, "designed to release from the wage-earning role the person whose natural function is to give her children the physical and mental guardianship necessary."

In other words, the program was designed to be for people whom Congress had made a judgment should not be employed outside the home.

Secondly, in 1961, Congress amended the Social Security Act. For the first time it included in the coverage of the Act children in homes in which a breadwinner was present. As part of that Act, and for the first time, Congress imposed a requirement that the breadwinner accept jobs to which he would be referred and report to the State Employment Service. That is the first time that we find a requirement of compulsory work in the Federal AFDC program.

In 1962, Congress then enacted a different compulsory work program, known as the Community Work and Training Program. The legislative history of that program is set out in a brief submitted by the National Welfare Rights Organization as amicus curiae, indicates that that program was still to be primarily for those fathers who were in the AFDC youth program, the breadwinners.

However, and most importantly, when the Work Incentive Program was enacted in 1967, both of those programs were repealed and replaced by requirements that States have Work Incentive Programs. The Community Work and Training Program was completely repealed. The requirement in the AFDC Youth Program that fathers accept work to which they were referred was repealed and replaced by a requirement that the States put all such fathers in the Work Incentive Program within thirty days of their eligibility for AFDC Youth benefits.

What the Work Incentive Program did was it identified those individuals who, in the judgment of Congress, were appropriate for compulsory work or training. It also identified those individuals by -- those individuals who were inappropriate for compulsory work or training.

Thirdly, it established an elaborate program of job placement and training for appropriate individuals and volunteers.

Fourthly and very importantly, it established -- it authorized the establishment of a separate administrative agency which would handle the Work Incentive Program, and different individuals in the State Employment Service do in fact operate the Work Incentive Program from those individuals who operate the normal State Employment Service referrals.

Fifthly, to repeat, the Work Incentive Program repealed --

QUESTION: I thought Mrs. Coon told us differently yesterday.

MR. YEAGER: Your Honor, I believe, if I recall, --

QUESTION: I thought I asked her whether the same personnel administered both programs; I thought she answered me that they did.

MR. YEAGER: I thought that she said the same offices did, Your Honor.

QUESTION: Oh, I see.

MR. YEAGER: Maybe my recollection is incorrect, but these people are located in the same building --

QUESTION: But they are different personnel?

MR. YEAGER: They are different personnel. The Department of Labor, in its Work Incentive Program manual, lists ten separate job titles --

QUESTION: This is the State Department of Labor?

MR. YEAGER: No, I'm sorry, Your Honor --

QUESTION: Oh, the Federal. Yes.

MR. YEAGER: -- the Federal Department of Labor that administers the Work Incentive Program.

QUESTION: Yes. I see.

MR. YEAGER: -- lists ten different job titles which it considers essential to the operation of the Work

Incentive Program.

In 1971 there were further amendments to the Work Incentive Program, and those amendments, first of all, refined the definition of those who should be compelled to work. Interestingly, it excluded all mothers of children under six.

At that time the statute was also amended to expand the range of services available by creating another separate administrative unit, this time within the Department of Social Services, which had as its function the providing of services designed to make people ready for certification to the Department of Labor, so that they could take part in the WIN program, and eventually be referred to work or training.

Fourthly, the statute, when it was amended, imposed a penalty on the States for failure to refer, to certify -- now, that's the second stage: failure to certify -- to the Department of Labor at least 15 percent per year of those who had been registered by the State Welfare Department as being eligible.

Also very importantly, when the statute was amended in 1971, it specifically stated that the registration requirement for those not exempt from WIN was a condition of eligibility for their receipt of assistance.

QUESTION: Mr. Yeager, I think Mrs. Coon told us that there are some 56 districts in New York?

MR. YEAGER: Yes, sir.

QUESTION: And the WIN program is active in only some 10 or 12?

MR. YEAGER: Dealing with 93 percent of the recipients --

QUESTION: But even so, is that the figure?

MR. YEAGER: That's -- I think those are the numbers; right.

QUESTION: Is your preemption argument that even in those districts where WIN is not presently being operated, the State program may not --

MR. YEAGER: Yes, Your Honor, it is.

QUESTION: In other words, it's complete exclusion?

MR. YEAGER: That's correct, Your Honor. The reason for that was discussed and explained in the district court opinion in Woolfolk v. Brown.

QUESTION: Well, in limiting it to 12 districts, whatever may be the number of beneficiaries or recipients, is that compliance, is the State complying with the requirements of the WIN program?

MR. YEAGER: Yes, Your Honor. Congress authorized the Secretary of Labor to establish programs in areas in which there would be a substantial number of welfare recipients, areas in which they thought the program would do some good. The Secretary of Labor has promulgated rules which state that those programs are only to be in areas where there are at

least 1100 recipients.

The way it works is that those individuals located in those areas are not exempt from WIN by virtue of the fact that they are not in an area where a WIN project has been established. To find out who is exempt, one must return to the definition of the exempt, one of which is a person who is too remote from a WIN project to be, to participate effectively in the program.

QUESTION: I see.

MR. YEAGER: That means, obviously, if someone is near the county line of a county that has got one, he can be closer than someone in the county and not be too remote. It is just where they physically locate the facility, is that second provision.

Very interestingly, too, when Congress enacted that particular provision, allowing the establishment of these programs in less than all of the areas, it required the Secretary of Labor to use his best efforts to provide transportation and other things to get the rest of the individuals, those not in those areas, in the program.

QUESTION: Say if you had a WIN program, say, in Rochester, but one recipient lived 30 or 40 miles from Rochester, he might be exempt merely because he lives that far away from Rochester.

MR. YEAGER: Because of the distance. Precisely.

He may not be exempt --

QUESTION: How does he get his exemption?

MR. YEAGER: The exemption is given to him by the Department of Social Services. It comes from the statute. The statute lists specifically those individuals --

QUESTION: Does he have a certificate or something to indicate his exemption?

MR. YEAGER: I don't think they give him a certificate, they just interview him and do not fill out the piece of paper which is called the registration paper; that's what it comes down to.

And everyone must be registered unless exempt. That is a requirement, the States must do that. I think that raises an interesting point, too, in connection with the State's suggestion here that there is a preference for WIN referral for individuals under the New York State program. That kind of a preference is really irrelevant if one examines the way the Federal statute operates.

If you're exempt from the program, from the Work Incentive Program, what good does it do that person, referred under the State program, to be referred to WIN? That person will be told that they can't participate.

If you're not exempt from the program, you're supposed to be registered for WIN. Registered for WIN, not registered for something else. Those individuals are yanked

out of WIN and placed in whatever facility, whatever service the State has available, which could include, admittedly, employment; but are kept from receiving the benefits of the Federal program.

As well, I might add, as the Job Placement requirements of the Federal program.

That, too, I think, gets to an interesting point, which is that under the Federal program, work referrals are not supposed to occur if those work referrals would interfere with a plan for the permanent rehabilitation or self support of the individual welfare recipient.

Now, that seems a perfectly logical rule. I think that some of the results -- that is not a requirement of the jobs; that's a difference in the standards of the jobs to which people are to be referred under the State program, as compared with the Work Incentive program.

And one of the results of this is that you get situations such as people being taken out of college and told to go to work at go-go dancers.

One other important aspect of the 1971 amendments should be mentioned, and that is that those amendments also enacted, as a matter of statutory law, certain priorities. Unemployed fathers and volunteer mothers were to be compelled to take part in the -- the unemployed fathers were to be compelled and the volunteer mothers were to be provided

with the services before those services or jobs were provided to other individuals.

There are no such priorities in the New York State program, and the consequence of that is really a virtual appeal of that aspect of the Federal law which establishes these priorities. Congress has set up a specific set of things that it wants these people to do. It has established an order in which those things are to be done. The State ignores that order and refers people directly to its own program in whatever order is available.

After the person has been registered for the Work Incentive Program, a process of appraisal begins under the rules that have been adopted by HEW. The statute itself requires that before a person can be placed in work or training the Department of Social Services must provide a number of services: counseling help, vocational rehabilitation, child care, and other services. The Federal Government picks up 90 percent of the cost of these services. Those services are designed to prepare the person for certification as ready for work or training.

I think an examination of the budgetary history of the Work Incentive Program is useful if one is to see what the purpose of those services really are, and how important they've been in the Federal program. In the fiscal year ending 1969, Congress appropriated $117,500,000 for the Work Incentive

Program. In the fiscal year ending 1972, that is the last year of the operation of the program before the 1971 amendments, Congress appropriated $259,160,000 for the program. In the proposed budget, admittedly an Australia budget, for fiscal year 1974, the President has proposed $534,434,000 for the Work Incentive program. Of that, $40 million is to go for the process of registration, this appraisal process that we were discussing, enrollment, follow-up services. Public service employment, $49 million. On-the-job training, $46 million; institutional training $151 -- $351 million. Other services, $116,000.

These services are real, I mean, they are provided, Congress wants them to be provided to Work Incentive Program participants. But it's not just services that are provided, it's also jobs. Congress did not leave the question of jobs to the operation of the marketplace, the way the New York State program does. Congress specifically appropriated money under Section -- specifically authorized use of appropriated money under Section 633(d) of the Act for job placement services and for job development services. The one-the-job training money and the public service employment money that I just described is money that is used to subsidize employment.

In addition, at the same time that the 1971 amendments came into effect, Congress amended the Internal Revenue Code, to provide a tax incentive for employers to employ WIN

graduates. In other words, Congress made it very clear that they did not intend this to be just a program of social services, it was a program that was designed to lead, in an orderly fashion, from a progress of registration of the non-exempt through a program of providing services, child care, counseling, training, and eventually into a permanent job.

The New York program interferes with that purpose.

Under the New York program, a presumption of employability was established. In other words, it was assumed that a welfare recipient was employable unless that person could demonstrate that he or she was not properly in the work program. Those individuals who were found to be employable were required, as we've mentioned before, to report to the State Employment Service, to obtain a certificate that no job is available from the State Employment Service, and could be terminated for failure to report to the State Employment Service; failure to report the results of a job interview, or failures to report to a job.

Notice that there is a real difference here between the Federal statute and the State statute. Under the Federal statute, the presumption is that one must register for the services designed to prepare one for work or training; under the State statute, the presumption is one of employability. Direct job referral can and often does result from a determination of employability.

This means that under the State program you leap from the first step, non-exemption, not being exempt from the program, all the way up to the last step, job placement.

One would not expect a program such as that to result in much successful permanent employment, and, in fact, the New York program didn't.

More than half of the persons referred under the New York work program were separated from the jobs in which they had been placed at the end of four weeks after placement.

Similarly, I think that it's interesting to compare the statistics on the numbers of individuals who were actually placed with those who were terminated. Not terminated because they had received income, but terminated because they were found to have failed to comply with the requirements of the State program.

In July 1971, there were 2,361 job placements under the New York program; 5,265 individuals were terminated. In August '71, 4,574 placements; 4,379 individuals terminated. September 1971, 4,378 terminations; 4,269 individuals placed.

That appears again in the HEW/Department of Labor study to which we've referred in our brief.

There's one other aspect of conflict between the New York work program and the Work Incentive Program, and that's one that's extremely important. The conflict between the procedures that are used under the New York program, and

the sanction as opposed to the procedures and sanction that are used under the Work Incentive Program.

In New York, there are basically two ways for one to obtain a hearing on whether or not one is out of compliance with the work group. First of all, -- two ways to obtain a hearing on the correctness of the determination if one is employable.

First of all, one can comply and,however hard that is, await the holding of a hearing.

Secondly, one cannot comply and risk termination of benefits for thirty days.

QUESTION: Let me interrupt you here, I want to see if I understand you: that the WIN program is so structured that a person has to go through stages before finally he ends up in a job placement, training, in this system?

MR. YEAGER: Yes.

QUESTION: Where -- now, suppose, on the way up, for one reason or another, it's determined that he doesn't qualify and he doesn't,therefore he's not required finally to go to a job placement; do I understand you that then the New York program can pick him up and require him to take a job placement without the training and other things that the WIN program calls for?

MR. YEAGER: Precisely.

QUESTION: And that if he doesn't,although under

WIN he would continued to get his benefits, under the State program they'd be terminated; is that it?

MR. YEAGER: Yes, Your Honor; that's exactly right. If they didn't take the job.

QUESTION: There are instances of this?

MR. YEAGER: Instances -- well, Your Honor, most of the people with whom we've dealt in the record receiving -- all of them got temporary restraining orders; they were engaged in that process, at the time that the temporary restraining order; orders came up. There were, of course, a number of terminations. There were -- I'm not -- I just don't know the answer, I guess is what it comes down to.

I think that this does bring out another point, which is that New York applies -- New York does apply its thirty-day penalty to an individual who refuses to take part in the Work Incentive Program. If you refuse to take part in the Work Incentive Program under Federal law, you're supposed to be terminated from benefits only if and so long as you do not comply. Once you make the decision that you will comply, you're allowed to receive your benefits again. But New York applies its thirty-day disqualification not only to people who fail to comply with the New York work rule, but also applies that thirty-day disqualification under its regulations to individuals who decline to participate in the Work Incentive Program. Presumably, they apply a whole new set of standards

at that point, when they make the decision about whether or not to impose that thirty-day requirement.

Under the Federal program, the procedures of course differ. First of all, one is entitled --

QUESTION: Now, under the State program there can be what, a local departmental review and then a State fair hearing procedure; is that right?

MR. YEAGER: That would be right, Your Honor. That would be right. It's the timing of that that is of concern. You get the fair hearing while, if you don't want to risk your grant, you must comply while you await the fair hearing.

QUESTION: You must go to the job that you're referred to?

MR. YEAGER: Go the job or pick up your check; that, of course, could be a considerable hardship for mothers with --

QUESTION: I was looking at the case of this Henrietta Smith, who was a student at Buffalo State University, studying mental retardation, and was referred to a job as a go-go girl.

MR. YEAGER: Yes.

QUESTION: And she got a -- she refused to go to the interview on what she said, moral grounds, grounds of this being an inappropriate job for a mother of two children; and she got a temporary restraining order. Was that in the State court or was that in --

MR. YEAGER: Federal.

QUESTION: -- in the Federal court, as part of this proceeding or --

MR. YEAGER: Yes, part of this proceeding, Your Honor.

QUESTION: So that's no part of the general procedure in this; that was an extraordinary injunction that she got in this proceeding in the Federal court, was it?

MR. YEAGER: Yes. She got a temporary restraining order in this proceeding. I --

QUESTION: That's no routine part of the procedure, to go to a court for a determination on a referral, is it?

MR. YEAGER: No, Your Honor, I don't think it would be, for a temporary restraining order.

Secondly, the other way to get the hearing is -- to finish with the response to the question -- is you can fail to comply; but that involves considerable risk, because these are very subjective judgments: Is this adequate child care? Is this job a good job? Is this a job I can perform? Am I healthy?

I mean, there are some very subjective elements that go into these decisions, and I think the situation of, say, a mother who is confronted with the fact that she doesn't care for the child care service that has been provided her, and she doesn't think it's adequate. She's obviously in conflict

with the administration.

QUESTION: Yes.

MR. YEAGER: That should be resolved before she's compelled to comply.

Finally, in conclusion, I think that what we really see here is that there is a Federal program which tells what the condition of eligibility for AFDC is insofar as there is any work condition of eligibility. The Federal Government repealed the authorization to the States to use other kinds of programs at the time that it enacted the Work Incentive Program, and the legislative history makes it very clear that the individuals who were covered were all individuals. You were either exempt or you were not exempt. The exempt were not supposed to be compelled to work; the non-exempt were supposed to be compelled, if need be, to take part in the Work Incentive program.

In addition, the evidence of preemptive intent is overwhelming. This is not a question of the perfection of the New York -- of the Federal program. If perfection were one of the criteria for preemption, then I suppose there would be no doctrine of preemption, human fallibility being what it is. We're talking here about a Federal program which is very substantial, which the statute, on its face, covers all of the individuals who could be covered, dividing them into the categories of those who must participate and those

who must not participate. And a very elaborate and expensive program has been established by Congress.

QUESTION: Mr. Yeager, if there is preemption, under your view, what happens on the part of New York State in which there is no WIN program?

MR. YEAGER: Your Honor, that would be covered by preemption. The individuals who are so remote from the program because there is not a program located in their State -- in their area, would be exempt. The individuals who were located close enough to participate, regardless of whether that WIN program was in their county or in their city or whatever it might be, would not be exempt, and they would be compelled to comply with the Federal program.

In other words, Congress dealt with that very specific point, and ruled that non-residents -- or residents in an area which was not a WIN area -- was not an exemption from the program.

QUESTION: Is the end result that in large parts of the State there would be no work program of any kind?

MR. YEAGER: Your Honor, that might be true geographically; but 93 percent of the welfare AFDC recipients in the State of New York are located in WIN areas.

Now, in addition to that, there would be individuals not located in WIN areas who would not be too remote from the program who would also have to participate. So it's a very

high percentage of the welfare recipients that are covered.

I think the remoteness requirement indicates very definitely that Congress took that into consideration.

QUESTION: Mr. Yeager, if, upon the filing of your complaint in the district court, the single district judge had felt the constitutional question were so insubstantial that he would refuse to convene a three-judge district court to hear it, would there still have been jurisdiction in that court to hear your statutory claim under 1343(3)?

MR. YEAGER: Your Honor, it would be our position that there would still have been jurisdiction in the court at that time under the cases holding that 1343(3) gives the court -- 1343(4) gives the Federal courts jurisdiction to review Federal -- State conformity with Federal statutes.

I believe, though, that there was a --

QUESTION: Well, all (4) says is: under any Act of Congress providing for the protection of civil rights, including the right to vote. Would you contend that the Social Security Act was an Act for the protection of civil rights?

MR. YEAGER: Your Honor, I think what we would contend -- well, we might contend that; but I think the first thing we would contend would be Section 1983 protects Federal rights for citizens, and that that is the statute which would bring the Social Security Act into play in the

Federal court; and, in turn, you would have jurisdiction because 1983 is a statute covered by 1343(4).

I think there was a substantial question below, Your Honor, for two reasons: No. 1, we won on one of those questions, the due process question; and, No. 2, on a very similar question, the fair hearing question, the Second Circuit recently continued their preliminary injunction on this thirty-day penalty requirement that had been issued by a district court judge.

QUESTION: Well, what has 1983 got to do with a three-judge court?

MR. YEAGER: Well, --

QUESTION: I mean, that might be Federal jurisdiction under 1983, but not before a three-judge court just because it's 1983.

MR. YEAGER: Well, Your Honor, that 1983 provides a remedy for the deprivation of Federal rights.

QUESTION: Well, it gives them the right to go to a Federal court, that's right. But it doesn't require a three-judge court.

MR. YEAGER: Well, Your Honor, 1983 doesn't require a three-judge court, but the statute -- this, as I'm saying here, an -- oh, I'm sorry. Okay. I have missed the point. On that point, you're right. I didn't -- it wouldn't be a three-judge court. But I thought --

QUESTION: But Justice Rehnquist's question still remains, then: if there was not a substantial enough constitutional question to require a three-judge court, could the three-judge court continue to address itself to the statutory question just because it's a 1983 case?

MR. YEAGER: Your Honor, I'm sorry. I thought Justice Rehnquist was asking me if the single judge would still have jurisdiction. That was the question to which I was trying to address myself.

As to that question, I think it's been unresolved at this point that in some of the cases the district courts have been continuing to sit as three-judge courts to deal with the statutory question, because there was a substantial Federal constitutional question.

Certainly, this Court, in Rosado v. Wyman, held that the single-judge court could retain jurisdiction if there were substantial constitutional question.

QUESTION: But there -- if there isn't one, it could not; is that it?

MR. YEAGER: If --? The three-judge court could not.

QUESTION: Right.

MR. YEAGER: Yes.

QUESTION: Thank you.

MR. YEAGER: Any further questions?

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Yeager.

Mrs. Coon.

REBUTTAL ARGUMENT OF MRS. JEAN M. COON,

ON BEHALF OF THE APPELLANTS

MRS. COON: Mr. Chief Justice, and may it please the Court:

Briefly, I would like to cover, in rebuttal, three points of argument.

One, the issue of preemption is one of congressional intent. I call Your Honors' attention to the quotes at pages 7 and 8 of our reply brief, in which we quote from the Chairmen of the appropriate congressional committees, who stated that it was not their intent, even in enacting the WIN program, to prohibit the States from providing for complementary work programs.

I think in the WIN statutes and in the 1971 amendments themselves there is some indication of a lack of such an intent. First of all, with the 15 percent penalty provision, which provides for a penalty for States which fail to refer into the WIN program 15 percent of their registrants to WIN, leaves a balance of 85 percent of the WIN registrants who Congress must have considered would not necessarily be processed through the WIN program, and it would seem to me that if those 85 percent could, by virtue of this statute, be

left out of any work requirement, if the State itself wanted to enact such requirement, might raise serious constitutional problems for the 15 percent who have been selected and required to go for employment.

Secondly, that the system of priorities which were established for referrals in the 1971 amendments, we submit to this Court, involved a question of the congressional determination of the use of, proper use of Federal funds. And that the proper use of the Federal funds should be, under the WIN program, to first place in employment those persons who were most job ready. It does not mean that this would solve priorities or persons who could be referred and under what conditions they could be referred for employment. And it seems to me that the simple establishment of priorities indicates congressional intent not to preempt the entire field to provide for work or training for all ADC recipients, because if they were all inclusive, there would not necessarily have been a system of priorities.

If you're going to include everybody, you don't need to establish priorities for when various classes are going to be included.

I'd like to call the Court's attention to the fact that -- and clarify, possibly -- the fact that the number of districts within the Social Services districts within a State, and in which the WIN program operates, is a determination solely

of the United States Secretary of Labor, and that in fact -- and it's referred to in one of our briefs -- the Secretary of Labor refused a request from the State of New York to increase the number of WIN districts within the State.

QUESTION: Well, is it, as Mr. Yeager said, Mrs. Coon, the fact that there are exemptions if one lives too far away from the WIN office?

MRS. COON: The Social Security Act exempts persons who are too remote from a WIN project to participate. Under the Woolfolk case, the district court in Woolfolk apparently interpreted that to mean too remote within a WIN district, because it said that the determinations to remoteness must be made on an individual basis and not on a geographical area basis.

And you're talking about a Social Services district in which there is no WIN project, presumably, that the remoteness issue could be taken up. It would be a geographical determination rather than an individual one.

I would also -- I think that Mr. Yeager misspoke; as far as WIN participants are concerned, New York State does not apply its thirty-day disqualification to actual participants in the WIN program.

The appellees here also raise a question as to conditional conditions of eligibility. I think in our reply brief we have got --

QUESTION: Well, how about the ones who want to go into WIN, and the Federal Government says you're exempted from WIN, or that you are unemployable, or for some reason that program thinks that they needn't, or that they shouldn't take employment?

MRS. COON: Well, actually, under the present New York statute, the definition of employability for ADC recipients under the State program is the WIN definition. The statute itself refers to that.

QUESTION: Well, you disagree with your colleague here --

MRS. COON: Yes.

QUESTION: -- as to whether or not New York would actually disqualify or terminate someone in that category?

MRS. COON: Someone who is unemployable under WIN would not be employable under this present New York State statute.

QUESTION: Well, didn't the lower court hold the contrary?

MRS. COON: They did, but they were interpreting a 1971 statute prior to the -- and not the 1972 amendments.

QUESTION: Well, then, is that conflict issue here, then?

MRS. COON: Well, --

QUESTION: Was that -- were those --

MRS. COON: Those amendments were enacted, actually, prior to the decision of the district court, but apparently were not called to its attention.

This program has been in the course of amendment ever since it was enacted, and particularly in 1972. This was an experimental program in New York State, and there were hardships which were discovered and which were taken care of in some cases by departmental regulations, and in others it was by statute, subsequent statutory enactment, some of which were on the record.

QUESTION: You mean that the subsequent amendments were on the books but had not been called to the attention of the --

MRS. COON: I believe that the definition amendment had not been called to the court's attention prior to its decision.

QUESTION: Well, whose responsibility was it to call it to the court's attention?

MRS. COON: Well, I suppose it was mine, but I didn't even know it was on the books myself, because the Department of Socil Services hadn't told me it was on the books.

And I apologize to Your Honors, but unfortunately we have about 16,000 bills which go through the New York State Legislature every year, and it -- we did know about some of them, the department had told us of some amendments, and those

were called to the court's attention. There were changes in the referral program.

QUESTION: Well, have you put in your brief, or any papers in this Court, the '72 amendments --

MRS. COON: Yes, in our reply brief.

QUESTION: -- as ompared with the previous law that the district court was dealing with?

MRS. COON: Yes. Those are in the briefs.

QUESTION: Mrs. Coon, the definition of employability is now identical, the WIN definition and the New York State definition, --

MRS. COON: Yes, it is.

QUESTION: -- does this mean that if somebody is found unemployable by the WIN people, that that's res judicata, or could that be redetermined by the State people, even though under the same criteria on paper, but a different determination upon the facts of any individual case; could that be done?

MRS. COON: No, it would not be done, because the same people make the determination of employability in WIN as under the State program. The WIN people -- people are referred to WIN by the State Social Services Department, the same people who would refer the same recipient to the State program. So the determination is made by the same person.

QUESTION: Well, what if the State people determined

that a person was employable and then got to WIN and WIN found them -- and referred them to WIN, and WIN found that, no, this person isn't employable, and therefore send them back?

MRS. COON: I think, since the definitions are the same, and they're not simply copied definitions --

QUESTION: Well, the definitions are the same for negligence, too; but jurists can reach all kinds of different results in --

MRS. COON: I think the result, by the way the statute is drafted, has to be the same. The Socil Services statute which sets up the State work program specifically refers the definition of employability of the ADC recipients to that section of the law which relates to WIN. So I think that the determination has to be identical.

And there are, of course, State court procedures for reviewing these determinations.

QUESTION: Yes, but you said that there just couldn't be inconsistent applications with respect to any individual person.

MRS. COON: Not to any ADC recipient who is under the WIN program; that's true. It could not.

QUESTION: Mrs. Coon, one thought, if the '72 amendments were critical to the resolution of the conflict issue in this case, what do you suggest the Court could do with it?

MRS. COON: Well, I think this Court could do what it did in the Shirley case, remand to the district court for consideration of the '72 amendments.

QUESTION: After bringing it all the way up here, we send it all the way back.

MRS. COON: Well, that's --

QUESTION: Do it all over again.

MRS. COON: -- that's what happened in Shirley, and Shirley is now in the process of being reheard.

QUESTION: Well, that still leaves the question, though, of the remedy or the thirty-day business that -- the inflexibility of a thirty-day suspension, as compared with the Federal.

MRS. COON: Well, I think if that were the -- if the thirty-day suspension were the only issue, certainly this Court could find the statute invalid as to that part without wiping out the whole State program.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Coon.

Thank you, Mr. Yeager.

The case is submitted.

[Whereupon, at 10:51 o'clock, a.m., the case in the above-entitled matter was submitted.]